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Supreme Court, U.S.
FILED
MAR 6 1996
CLERK

No. 95-1084

In The

Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PRIVATE RESPONDENTS' BRIEF IN OPPOSITION

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March 6, 1996

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QUESTIONS PRESENTED

Whether the definition of "public lands" in § 102 of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3102(1)-(3), encompasses appurtenant navigable waters reserved as necessary parts of the various federal reservations Congress has set aside from the public domain in Alaska, thereby making the priority for subsistence fishing on the "public lands" mandated by §§ 803-805 of ANILCA, 16 U.S.C. §§ 3113-3115, applicable to such waters?

Alternatively, are all navigable waters in Alaska "public lands" to which the ANILCA subsistence priority applies by virtue of the United States' navigational servitude?

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PRIVATE RESPONDENTS' BRIEF IN OPPOSITION[1]

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1) is now reported at 72 F.3d 698 (Dec. 19, 1995), *superseding* 54 F.3d 549 (April 20, 1995). The district court's opinion granting partial summary judgment to private respondents is unreported, Nos. A90-0484 & A92-0264-CV (HRH), 1994 WL 487830 (D. Alaska, March 30, 1994), and is reproduced in the Supplemental Appendix ("Pet. Supp. App.") filed by petitioner.

STATEMENT

This case presents an issue of statutory interpretation involving one section of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3102(1)-(3), a statute unique to Alaska with no application to any other state.

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[1] Private respondents are the non-governmental parties in two cases which were consolidated for disposition below: *Katie John v. United States*, No. A90-0484-CV (HRH), and *Alaska v. Babbitt*, No. A92-0264-CV (HRH) (D. Alaska). Private respondents are the plaintiffs in the *Katie John* case, who are two individual Alaska Natives (Katie John and Doris Charles) and a federally recognized Indian tribe (Mentasta Village Council); and the Alaska Federation of Natives ("AFN"), a statewide Native organization, which was permitted to intervene as a defendant and to file a cross-claim against the federal defendants in the *Alaska v. Babbit* case.

The Statutory Background And Framework

In § 4 of the Alaska Statehood Act, Congress required the newly admitted State to "forever disclaim all right and title . . . to any lands or other property (including fishing rights)" of Alaska Natives, which lands and other property "shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe." Pub. L. No. 85-508, 72 Stat. 339 (1958), as amended, 73 Stat. 141 (1959).[2] Under the terms of Alaska's admission to the Union, therefore, the fishing rights of Alaska Natives, including their rights to fish in the navigable waters of the State, *see Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), were expressly reserved by Congress for its own disposition. *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

With enactment of the Alaska Native Claims Settlement Act ("ANCSA") in 1971, Pub. L. No. 92-203, 85 Stat. 688, 43 U.S.C. §§ 1601-1628, Congress confronted the land and land-related claims of Alaska Natives and extinguished hunting and fishing rights based on aboriginal title, 43 U.S.C. § 1603(b). At the same time, Congress

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[2] Similarly, in Article XII, § 12 of the Alaska Constitution of 1956, by which Alaska sought statehood, "[t]he State and its people further disclaim[ed] all right or title in or to any property, including fishing rights," of Alaska Natives, which "shall remain subject to the absolute disposition of the United States."

made clear its intent to continue federal protection of the subsistence hunting and fishing rights of Alaska Natives. Thus, while the Senate and the House were unable to agree on the best means for fulfilling this intent, the ANCSA Conference Committee recognized these rights and expressed the conviction that the Secretary of the Interior could "exercise his existing withdrawal authority" to "protect Native subsistence needs and requirements." H. CONF. REP. No. 92-746, 92d Cong., 1st Sess. 37 (1971), *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 2247, 2250. The Report further stated: "The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." *Id.*[3]

Congress returned to the subject in 1980 in the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487 (Dec. 2, 1980), 94 Stat. 2371. There, Congress undertook two principal comprehensive purposes: (1) to set aside, expand or redesignate vast tracts of the public domain in Alaska as various "conservation system units," in order to preserve the natural features and resources of those lands and waters

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[3] In the wake of ANCSA, Congress continued to act affirmatively to recognize and protect the subsistence rights of Alaska Natives. *See, e.g.*, Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(b) (expressly exempting from the taking moratorium "any Indian, Aleut, or Eskimo who dwells on the coast of the North Pacific Ocean or the Arctic Ocean," if such taking is for "subsistence purposes" or for the "creating and selling" of handicrafts and clothing); Endangered Species Act of 1973, 16 U.S.C. § 1539(e)(1) (again containing exemptions for subsistence uses by Natives and "any non-native permanent resident of an Alaskan native village").

for present and future generations; and (2) "to protect the resources related to subsistence needs" and "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." ANILCA §§ 101(a)-(c), 94 Stat. at 2374-75, 16 U.S.C. §§ 3101(a)-(c). With respect to the latter purpose – protecting the subsistence way of life of rural residents – Congress in Title VIII generally impressed all "public lands" in Alaska with a preference for subsistence uses of fish and wildlife over all other uses. ANILCA §§ 801-816, 94 Stat. at 2422-30, 16 U.S.C. §§ 3111-3126.[4] "Public lands" are defined as " 'lands, waters, and interests therein' 'the title to which is in the United States.' " *Amoco Production Co. v. Village of Gambell,*

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[4] This direct protection of the Native subsistence way of life is, in turn, reinforced in the specific primary purposes of many of the conservation system units established, redesignated or expanded by the Act. Subsistence uses are specifically authorized in all or significant parts of 12 of the 13 national parks and preserves addressed in the Act (§§ 201-202, 94 Stat. at 2377-83); all of them include the protection of habitat for, and populations of, fish and wildlife, usually specifically including salmon, as well as waterfowl and other migratory birds, among their express primary purposes; and three of them specifically mention as a primary purpose protection of "the viability of subsistence resources."

Similarly, 15 of the 16 national wildlife refuges established, redesignated or expanded by the Act expressly include "the opportunity for continued subsistence uses by local residents" as a primary purpose of the refuge. ANILCA §§ 302-303, 94 Stat. at 2385-93. Each of the 16 refuges includes among its explicit purposes the conservation of fish and wildlife populations (specifically listing "salmon" or "salmonoids" in all refuges where such species are found), the fulfillment of "international treaty obligations," and the assurance of "water quality and necessary water quantity."

480 U.S. 531, 548 n.15 (1987) (melding the definition in ANILCA §§ 102(1)-(3), 16 U.S.C. §§ 3102(1)-(3)).

Congress used the term "fish" over twenty times in Title VIII, with good reason. Almost invariably, the largest subsistence food source for Alaska Natives is fish, accounting by weight for some two-thirds of the statewide subsistence harvest. In addition to its nutritional value, subsistence fishing provides vital social and cultural values for Alaska Native Villages; it is a central factor unifying tribal families and communities. *See, e.g., Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir. 1994); *United States v. Alexander*, 938 F.2d 942 (9th Cir. 1991); *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989).

While protection of the subsistence way of life of Alaska Natives was the driving concern of Title VIII, Congress in the end afforded the subsistence-use preference to all "rural residents." Congress did so to accommodate Alaska's concern that the Alaska Constitution prevented the State from providing a subsistence priority limited to Alaska Natives. *See Kenaitze Indian Tribe v. Alaska, supra*, 860 F.2d at 313 n.1. Accordingly, in Title VIII Congress found that

> in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents.

ANILCA § 801(4), 16 U.S.C. § 3111(4).[5] Congress declared its policy to be that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands," and that "nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska." ANILCA §§ 802 (1) and (2), 16 U.S.C. §§ 3112(1) and (2). The substantive provisions of the title define subsistence uses as the "customary and traditional uses" of fish and wildlife resources by "rural Alaska residents" (§ 803), and confer a priority for the taking of fish and wildlife for subsistence uses on the "public lands" (§ 804). 16 U.S.C. §§ 3113, 3114.

In addition to substituting a "rural" hunting-and-fishing preference for a "Native" one, Congress sought to accommodate Alaska's interests in another significant way: by enabling the State to have primary regulatory responsibility for assuring the priority for subsistence uses of fish and wildlife on all lands and waters, federal as well as State. Thus, while subsections 805(a) through (c) require the Secretary to implement a comprehensive subsistence-use management system on the public lands,

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[5] Congress determined that the opportunity for continued subsistence uses "is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence" (§ 801(1)), but that the opportunity "is threatened by the increasing population of Alaska" and the "increased accessibility of remote areas containing subsistence resources," among other things (§ 801(3)). 16 U.S.C. § 3111.

16 U.S.C. §§ 3115(a)-(c), and § 814 directs that the Secretary "shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title [VIII]," 16 U.S.C. § 3124, the State is given the power to supplant federal management by § 805(d), 16 U.S.C. § 3115(d):

> The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year of the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses.

Finally, § 807(a) affords subsistence users a private right of action in federal court to enforce the subsistence priority against either the State or the Secretary (depending on which of them is exercising management authority). 16 U.S.C. § 3117(a).

Congress expressly acknowledged that by these provisions it was imposing conditions on the State's "traditional" authority to regulate the taking of fish and wildlife on the public domain. Consequently, ANILCA § 1314 states that "[n]othing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands *except as may be provided in Title VIII*, or to amend the Alaska constitution," nor "to enlarge or diminish" the Secretary's responsibility and authority

over management of the public lands *"[e]xcept as specifically provided otherwise by this Act."* 16 U.S.C. §§ 3202(a) and (b) (emphases added).

The Background Of This Litigation

As noted above, § 805 of ANILCA requires the Secretary to implement a subsistence-preference management program on the public lands if the State either fails to enact or repeals State laws of general applicability that conform with the requirements of §§ 803-805 of the Act. Initially the State accepted the congressional conditions, and on May 14, 1982, the Secretary of the Interior certified the State's statutory and regulatory program as complying with §§ 803-805 of ANILCA, expressing his determination that "[a]s a result of this certification of compliance, the State retains its traditional role in the regulation of fish and wildlife resources on the public lands in Alaska."[6] When three years later the Alaska Supreme Court held that the "rural residents" restrictions of the State's regulatory program were inconsistent with the then-extant version of the State statute, *Madison v. Alaska Dept. of Fish & Game*, 696 P.2d 168 (Alaska 1985), the Legislature promptly corrected the statute in the hope of complying with ANILCA and retaining state subsistence-management authority on the public lands. *See Kenaitze Indian Tribe v. Alaska, supra*, 860 F.2d at 314; *Bobby v. Alaska, supra*, 718 F. Supp. at 768.

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[6] Letter from Secretary Watt to Governor Hammond, *reprinted in Bobby v. Alaska*, 718 F. Supp. 764, 812-13 (D. Alaska 1989).

Unexpectedly in December of 1989, however, the Alaska Supreme Court held that the Alaska Constitution prohibits the Legislature from enacting a subsistence-use priority that is limited to rural residents. *McDowell v. State*, 785 P.2d 1 (Alaska 1989) (decision stayed until July 1, 1990). The court acknowledged the pre-emptive scope of ANILCA,[7] and that the result of its holding would be the loss of state subsistence-management authority on federal lands and waters. *Id.* at 10 n.20.[8]

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[7] *See* 785 P.2d at 3 ("ANILCA requires federal management of public lands in Alaska in order to ensure the subsistence priority. However, federal management may be supplanted by the state so long as the state enacts and implements subsistence laws 'which are consistent with, and which provide for the definition, preference, and participation specified in' ANILCA," *quoting* 16 U.S.C. § 3115(d) (footnotes omitted)).

[8] With the "rural preference" of State law severed on constitutional grounds, Alaska continues to have a law that purports to afford a priority for subsistence uses on lands and waters that remain under State jurisdiction. This so-called priority, however, in reality dilutes the rights of true subsistence users. Under State law, all Alaska residents who hunt and fish are deemed to be subsistence users, and hence eligible to participate in any subsistence hunt or fishery anywhere in the State. *See State v. Morry*, 836 P.2d 358 (Alaska 1992). Consequently, urban hunters and fishers are entitled to travel to any rural area in the State and hunt and fish on the same "priority" basis as local villagers – precisely one of the principal reasons Congress found it necessary to afford a priority to *rural* residents. *See* note 5, *supra*. At the same time, true Native subsistence users who are residents of areas recently classified as "non-subsistence" under State law, but which are deemed rural under federal law, are *prohibited* under Alaska law from engaging in subsistence hunting and fishing in their historical local use areas (insofar as these lands and waters are not federal "public lands"). *Compare Kenaitze Indian Tribe v. Alaska, supra*, with *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995).

In the wake of *McDowell*, the Secretary implemented a subsistence-management program for the public lands in Alaska. 55 Fed. Reg. 27,114 (June 29, 1990) (temporary subsistence management regulations); 57 Fed. Reg. 22,940 (May 29, 1992) (permanent regulations); *see* 36 C.F.R., Part 242; 50 C.F.R., Part 100. That program has been in effect, and the State's authority over subsistence uses of fish and wildlife on the public lands (some two-thirds of Alaska's landmass) correspondingly circumscribed, for over five years. So far, however, the protection of federal law has been limited primarily to subsistence uses of land mammals on federal fast-lands, with no protection for the vast majority of subsistence fisheries that are the object of keen competition from sport and commercial users. This is because the federal program has excluded from its protective coverage most of the important subsistence fishing grounds of rural Alaska Natives and other residents. Indeed, at the outset it was the Secretary's avowed policy to implement a program "that minimizes change to the State's program" in order to avoid "unnecessary chaos if and when the State is able to bring its subsistence program back into compliance with ANILCA." 55 Fed. Reg. 23,522 (June 8, 1990). *See also* 55 Fed. Reg. at 27,115 (June 29, 1990). Nowhere was the effort at minimizing more complete than with respect to the exclusion of the majority of navigable waters (and hence the majority of subsistence fishing) from the "public lands" scope of the program. *See* 55 Fed. Reg. at 23,526 (proposed temporary regulations) (defining "public lands" as including certain federal lands, and "*Federal lands* means lands the title to which is in the United States"); 55 Fed. Reg. at 27,122

(adopting proposed regulations). The Secretary explained that, although the statutory definition of "land" includes "interests" in "waters" (16 U.S.C. § 3102(1)), navigable waters were being excluded from the federal program because "[t]he United States generally does not hold title to navigable waters." *Id.* at 27,115.

When the final regulations were adopted in 1992 (by which time it was apparent the State likely would not soon bring its program back into compliance with ANILCA), both the "public lands" definition and the explanation had changed, but the result remained essentially the same. Although the new definition now tracked the statutory language,[9] the Secretary continued generally to exclude navigable waters from the program's coverage, now on the basis of the ownership of the lands underlying such waters: "Because the United States does not generally own title to the submerged lands beneath navigable waters in Alaska, the public lands definition in ANILCA and these regulations generally excludes navigable waters." 57 Fed. Reg. at 22,942.[10] *See* Pet. Supp. App. 30-32.

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[9] "Federal lands means lands and waters and interests therein the title to which is in the United States." 57 Fed. Reg. 22,940, 22,952 (May 29, 1992).

[10] As a result, the only subsistence fishing protected by the federal program is that limited amount which takes place on non-navigable waters on federal lands, and the waters overlying certain tracts of submerged lands that were withdrawn by the national government prior to statehood. *See* 36 C.F.R. §§ 242.3(b) & (c); 50 C.F.R. §§ 100.3(b) & (c). In the overall context of subsistence fishing, this is very limited protection. The subsistence priority is needed most where there is the greatest competition over fishery resources; this

The Proceedings Below

On December 5, 1990, private respondents Katie John, et al., initiated suit against the Secretary in *Katie John v. United States* (*see* note 1, *supra*), alleging that the federal subsistence program mandated by ANILCA had been unlawfully restricted by excluding from its coverage navigable waters in which the United States owns interests (including their traditional subsistence salmon fishery at an ancient site known as Batzulnetas within the Wrangell-St. Elias National Park and Preserve). *See* Pet. App. 2; Pet. Supp. App. 23-25. The State was later added as a defendant. Over a year later, on February 27, 1992, the State filed its complaint in *Alaska v. Babbitt* (*see* note 1, *supra*), the main focus of which alleged (erroneously) that the Secretary had asserted subsistence-management jurisdiction over certain navigable and non-navigable waters belonging to the State, but which came to be understood as challenging the authority of the Secretary to implement *any* subsistence-management program on the public lands. Private respondent Alaska Federation of Natives was permitted to intervene as a defendant/cross-claimant. The cases were consolidated by the district court.

On March 30, 1994, the district court granted partial summary judgment to private respondents, upholding the authority of the federal government to implement a subsistence-management program on the "public lands" under Title VIII of ANILCA (Pet. Supp. App. 10-21),

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competition from commercial and sport user groups (and the great majority of subsistence fishing) takes place in the navigable waters that are excluded from the Secretary's 1992 "public lands" definition.

which the court then construed to encompass all navigable waters in Alaska by virtue of the navigational servitude of the United States. *John v. United States*, Nos. A90-0484 & A92-0264-CV (HRH), 1994 WL 487830 (D. Alaska) (Pet. Supp. App. 27-43). While the court expressed its agreement with the lesser proposition advanced by private respondents that ANILCA's "public lands" definition embraces appurtenant federal reserved waters, the court determined that the navigational servitude was more appropriate than the reserved-water-rights doctrine, and "more compatible with the findings and policies of Title VIII of ANILCA," in "determining the geographic scope of Title VIII." Pet. Supp. App. 33-34.

The State took a permissive appeal under 28 U.S.C. § 1292(b) as to both holdings of the district court. Although the Secretary also appealed from the holding as to the navigational servitude, during the pendency of the litigation the Secretary changed positions and acknowledged that the federal subsistence program should be extended to encompass those navigable waters in which the United States owns reserved water rights. Prior to oral argument in the Ninth Circuit, the State abandoned its appeal insofar as it concerned the issue of the Secretary's authority to provide for the subsistence priority on public lands, and the State accordingly entered into a stipulation dismissing the appeal of that issue with prejudice. The Ninth Circuit accepted the stipulation of dismissal, *Alaska v. Babbitt*, 54 F.3d 549, 551 n.2 (April 20, 1995), and this Court denied petitions for certiorari by the Alaska Legislature and the Alaska Outdoor Council seeking to resurrect the issue, 116 S. Ct. 68, 272 (Oct. 2, 1995).

On the issue of the scope of Title VIII's protection for subsistence fishing, the Ninth Circuit (with one judge eventually dissenting in part) reversed the district court's holding as to the navigational servitude, but also held (as the district court had implied) that federally reserved navigable waters are "public lands" under ANILCA, and that the Secretary has the responsibility for identifying those waters and extending the subsistence priority to them. 72 F.3d 698, 703-704 (Dec. 19, 1995) (Pet. App. 11-12), *superseding* 54 F.3d 549.

REASONS WHY THE PETITION SHOULD BE DENIED

As the court below correctly observed (72 F.3d at 702 n.9 (Pet. App. 8 n.9)), this case is *sui generis*, involving as it does a singular statutory scheme with unique purposes applicable to Alaska alone. Contrary to the suggestions of petitioner and its *amici*, the decision below has no ramifications beyond the borders of Alaska.[11] Even with

[11] Alaska and its friends contend that the phrase "lands, waters and interests therein" (one component of the ANILCA definition of "public lands") is boilerplate routinely employed by Congress in establishing, and in authorizing federal acquisition of property for, parks and conservation areas. *See* Pet. at 15 n.5; Brief *Amici Curiae* for Arizona, et al., at 11-12. They point to no statute, however, which invokes that phrase in conjunction with a statutory definition of "public lands," much less one that uses these terms to define the scope of federally protected activities such as subsistence hunting and fishing. As this Court has held in the context of the same statutory language at issue here, the phrase "public lands" does not, "in and of itself," have "a precise meaning, without reference to a definitional section or its context in a statute." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n.15 (1987).

respect to its impact within Alaska, moreover, the decision below presents no issue warranting review here.

I.

CONGRESS CLEARLY INTENDED FEDERAL MANAGEMENT TO DISPLACE STATE MANAGEMENT OF ALL SUBSISTENCE FISHERIES THAT TAKE PLACE ON THE "PUBLIC LANDS," AND THE NINTH CIRCUIT CORRECTLY HELD THAT FEDERALLY RESERVED WATERS ARE "PUBLIC LANDS"

The State's reliance on the "clear statement" doctrine (Pet. 13-21) is difficult to fathom. In clear and unmistakable terms, Title VIII of ANILCA prescribes a system for ensuring a priority for subsistence uses of *fish* and wildlife on the "public lands," and just as clearly prescribes the requirements necessary for the State to supplant federal subsistence management on those lands. *See* pp. 3-8, *supra*. Further, § 102 of ANILCA defines "public lands" as lands, waters, and interests therein title to which is in the United States. It is thus plain that, if the State fails to comply with the prescribed conditions, Congress intended for the Secretary to ensure a priority for *all* subsistence fishing on *all* public lands. Indeed, the State appears to concede as much. *See* Pet. 9, 20-21.

The question presented by this case accordingly is not one governed by the "clear statement" doctrine, but rather by old-fashioned principles of statutory construction: Does ANILCA's definition of "public lands" encompass either (a) all navigable waters in Alaska (by virtue of the United States' navigational servitude) or (b) appurtenant navigable waters reserved as parts of the federal reservations Congress has set aside in Alaska? The Ninth

Circuit correctly answered the latter part of that question, and the correct answer to the first part also sustains its judgment. Further review is unwarranted.

1. It appears to be undisputed that, in establishing and expanding numerous "conservation system units" (defined in ANILCA § 102(4), 16 U.S.C. § 3102(4)) in Alaska, Congress also "reserve[d] appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). Nor, as the district court noted (Pet. Supp. App. 32-33), is there any dispute that waters appurtenant to Wrangell-St. Elias National Park (where private respondents' subsistence fishery is located) were reserved as part of the Park. This Court has established a relatively simple test for ascertaining the nature and scope of federally reserved waters:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

Cappaert, supra, 426 U.S. at 139. The Court has explained that identifying what is "necessary to accomplish the [reservation's] purposes" entails a determination "that without the water the purposes of the reservation would be entirely defeated." *United States v. New Mexico*, 438 U.S. 696, 700 (1978). Lack of appurtenant water plainly would defeat the purposes of many, if not most, federal reservations in Alaska. *See, e.g.*, note 4, *supra*.

2. Any debate over ANILCA's definition of "public lands," and its use of the term "title" in conjunction with "interests" in "waters," 16 U.S.C. §§ 3102(1) & (2), was resolved by this Court in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n.15 (1987) (which neither the State in its petition nor the Alaska Supreme Court in its *Totemoff* argument (*see* part II, *infra*) even mention). In *Gambell*, the Court construed this very definition and rejected any hypertechnical reading of "title." 480 U.S. at 548 n.15. The issue there concerned the government's contention that the Outer Continental Shelf is not "public lands" under ANILCA because the United States does not claim "title" to the OCS. Said the Court (*id.*):

> The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States." We also reject the assertion that the phrase "public lands," in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute. See *Hynes v. Grimes Packing Co.*, 337 U.S., at 114-116.

This construction of the statute forecloses the State's present attempt to read "interests in waters" out of the statutory definition. For if the only waters encompassed in the ANILCA definition were those overlying the *submerged lands* which are owned by the United States, the statutory reference to separate "interests in waters" would be rendered superfluous.

The State and its Supreme Court have also failed to analyze and appreciate numerous authorities holding that riparian interests in waters such as the reserved waters at issue here, although usufructuary as opposed to possessory, nonetheless constitute real property interests that may be assigned and mortgaged, bought, leased and sold, and may not be taken without just compensation. *See, e.g., Dugan v. Rank*, 372 U.S. 609, 625 (1963); *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). Nor may a state, absent specific congressional authority, "destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899). The reserved waters appurtenant to federal reservations in Alaska are an essential part of the reservations themselves, to which the United States holds "title" as that term is employed in the statutory definition and context.

3. The State's assertion (Pet. 19) that classifying federal reserved waters as public lands results in a definition that is "so difficult to apply" and "meaningless" is hard to grasp.[12] The suggestion that reserved waters do not

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[12] The State informs the Court that "a federal interest in lands or waters might constitute 'public lands,' but the existence of the interest does not convert vast areas of land and waters into 'public lands.' " Pet. 19 n.7. The point is obscure. If it is that the interest in waters constituting public lands may not be construed as abrogating the remaining interests in those waters held by others, including the State, the point may be conceded. But under the statutory definition the waters are still "public lands" to which ANILCA applies.

constitute a "definite area" (*id.*) is quite mistaken. While there might be future discrete controversies over whether a particular reservation includes appurtenant waters, we have no doubt in the ability of federal land-management agencies generally to identify those appurtenant rivers and streams, or portions thereof, that are reserved as part of the reservation. Nor is there any need in the context of this litigation, as argued by the State (*id.* at 19-20) and the dissenting judge below (Pet. App. 20), for the government to *quantify* the "minimum amount of water" that must be preserved for the reservations. All that is at issue here is whether these indisputably federal interests in the waters qualify them as public lands to which the Title VIII priority for subsistence fishing applies, and that is all the Ninth Circuit has held. Title VIII requires the Secretary to assure the priority for subsistence fishing on *all* public lands, regardless of their particular purposes, unless prohibited by some other provision of ANILCA or other federal laws. *See, e.g.*, ANILCA § 804, 16 U.S.C. § 3114. The federal management obligation is imposed by ANILCA itself, not by the various interests in lands and waters which make them public lands.

4. The State also contends that Alaska's ownership interest in lands, waters and natural resources granted by the Submerged Lands Act of 1953 (SLA), 43 U.S.C. §§ 1301 *et seq.*, constitutes an exception to ANILCA's "public lands" definition since § 102(3)(A) of ANILCA exempts from "public lands" those "lands which have been . . . granted to . . . Alaska . . . under any other provision of Federal law." 16 U.S.C. § 3102(3)(A).

The State's SLA contention suffers from a fundamental flaw in its premise. Although § 6(m) of the Alaska

Statehood Act, 72 Stat. 343, makes applicable to Alaska the SLA's grant of rights to other States, § 4 of that same Act, 72 Stat. 339, required the State to "forever disclaim all right and title . . . to any lands or other property (including fishing rights)" of Alaska Natives, which lands and other property "shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe." *See* p. 2, *supra*. Reading these provisions in *pari materia*, it cannot seriously be suggested that § 6(m) and the SLA granted that which § 4 expressly reserved. Even if the SLA had the meaning the State ascribes to it, the Statehood Act's reservation of "property (including fishing rights)" of Alaska Natives plainly precludes those property rights from passing to the State under the SLA. Those rights were kept by Congress for future disposition, such as that made in ANILCA.

But the State is also mistaken in urging that the SLA relinquished the federal government's proprietary right in reserved waters. As noted earlier, when Congress sets aside public lands it also "reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). Federally reserved water is federal property which the federal government can use without compliance with state law. *Winters v. United States*, 207 U.S. 564 (1908). Congress has plenary authority under the Property Clause to regulate and dispose of such federal property, *Utah Division of State Lands v. United States*, 482 U.S. 193, 201 (1987), and its authority includes the power to control the disposition and use of water on,

under, flowing through or appurtenant to such lands. *United States v. Grand River Dam Authority*, 363 U.S. 229, 235 (1960). No vested interest in the property of the United States may be acquired in the absence of an express grant from Congress and absent that grant or consent, it continues to be held by the United States. *Id.*; *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404-05 (1917). Most importantly, such grants and disposals to the States are not lightly inferred and "nothing passes but what is conveyed in clear and explicit language, – inference being resolved not against but for the Government." *Caldwell v. United States*, 250 U.S. 14, 20 (1919); *see also Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978).

The SLA on its face lacks the requisite "clear and explicit" language necessary to relinquish the federal government's proprietary rights in reserved waters. Nowhere in the Act are reserved waters expressly mentioned, let alone Congress' plenary authority to dispose of public lands or waters. Moreover, it is well established that the SLA created no new rights for the States in their inland navigable waterways beyond that afforded by the equal-footing doctrine. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 324 (1973); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 n. 4 (1977). The Act "was intended to be merely confirmatory of the State's existing rights in the beds of their navigable waterways." *Bonelli*, 414 U.S. at 324 n. 19.

It is equally well established under the equal-footing doctrine that the admission of a State into the Union does not divest Congress of its plenary control over inland navigable waterways. *Arizona v. California*, 373 U.S. 546, 579-98 (1963) (limiting the equal-footing doctrine to the

beds of navigable waters, not the waters themselves). "[E]ven if the land under navigable water passes to the State, the federal government may still control, develop, and use the waters for its own purposes." *Utah Division of State Lands v. United States*, 482 U.S. 193, 202 (1987).

On numerous occasions this Court has concluded that whatever powers the States acquired over their waters as a result of congressional enactments and admission to the Union, Congress has never intended thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 702 (1899); *Winters v. United States*, 207 U.S. 564, 577 (1908); *Arizona v. California*, 373 U.S. 546, 579-98 (1963); *Cappaert v. United States*, 426 U.S. 128, 143-46 (1976); *United States v. New Mexico*, 438 U.S. 696, 698 (1978). Here, this conclusion is only strengthened by Congress' continued reservation of waters in Alaska for various purposes despite the SLA's alleged conveyance of all such interests to the State. *See, e.g.*, Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271, 1284(c), Pub. L. No. 90-542 (Oct. 2, 1968), 82 Stat. 917.[13]

Equally bereft of merit is the State's claim that the SLA's transfer to the States of management authority over natural resources precludes the federal government from exercising regulatory authority over fish and wildlife in

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[13] Twenty-six rivers in Alaska have been specifically reserved under the Wild and Scenic Rivers Act, "to be administered by the Secretary of Interior." 16 U.S.C. §§ 1274(25)-(50).

navigable waters. Pet. 18. This Court considered and rejected this very argument in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 283-84 (1977).[14]

5. Finally, even if the Ninth Circuit had committed some error in its holding that ANILCA's "public lands" definition encompasses federal reserved waters, the court's judgment in this case must still stand because the navigational servitude of the United States constitutes an interest in navigable waters owned by the United States, making all navigable waters in Alaska public lands for ANILCA purposes.[15] Indeed, if the Ninth Circuit erred in any respect, it erred in rejecting the district court's well-reasoned conclusion (Pet. Supp. App. 34-43) that the navigational servitude is an interest of the United States in

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[14] Consistent with the SLA's savings clause, Congress has repeatedly exercised its reserved power to regulate fish and wildlife in navigable waters. *See, e.g.*, the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. § 1151), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. §§ 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. §§ 1361-1407), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. §§ 1801-1882), and the Federal Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. §§ 777-777K). Significantly, Title VIII of ANILCA acknowledges these Acts as "governing the conservation or protection of fish and wildlife." § 815(4), 94 Stat. at 2429, 16 U.S.C. § 3125(4). Each of these Acts would be reduced to a nullity under Alaska's reading of the SLA.

[15] The subsistence fishery of private respondents Katie John, et al., is conducted in navigable waters within a national park that are both federally reserved and subject to the navigational servitude. Private respondents are thus entitled to the ANILCA subsistence priority if those waters are public lands by virtue either of being reserved waters or being within the navigational servitude.

the navigable waters of Alaska that falls within ANILCA's definition of "public lands."[16]

II.

THERE IS NEITHER A "JURISDICTIONAL CRISIS" NOR A CONFLICT IN DECISIONAL LAW WARRANTING THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION

Alaska's claim (Pet. 8-13) of a "jurisdictional crisis" rests upon a mischaracterization of the effect of the Alaska Supreme Court's "conflicting" decision in *Totemoff v. State*, 905 P.2d 954 (1995) (Pet. App. 25). Contrary to petitioner's assertions, Alaska is not "bound to follow" (Pet. 9) the *Totemoff* dictum, for the simple reason that the state court has not purported to direct the State to do anything, much less contravene a federal court order entered in a case in which Alaska is a voluntary party. The "conflicting" portion of the Alaska Supreme Court's *Totemoff* opinion, moreover, is entirely manufactured. The *Totemoff* case itself (a criminal prosecution for "spotlighting deer") presented no issue of whether federal reserved

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[16] In its rather perfunctory rejection of the district court's holding on this point, the Ninth Circuit relied on its earlier summary conclusion in *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (1986), *cert. denied*, 484 U.S. 870 (1987), that the United States does not hold "title" to the navigational servitude. 72 F.3d at 702-03 (Pet. App. 9-10). But the *Angoon* decision predated this Court's decision in *Amoco Production Co. v. Village of Gambell*, 480 U.S, 531, 548 n. 15 (1987), in which the Court made it clear that technical fee title is not the *sine qua non* of ANILCA's "public lands" definition. *See* p. 17, *supra*.

waters constitute "public lands." The only waters arguably involved in that case were the marine waters of the territorial sea, as to which the reserved-water-rights doctrine has no application. The Alaska court reached far beyond the controversy before it – the court even ignored a stipulation by the State to be bound by the outcome of this federal litigation – for the sole apparent purpose of orchestrating a "conflict" with the Ninth Circuit that would induce this Court to grant review here.[17] Fairly assessed, the *Totemoff* decision creates no more of a "conflict" for purposes of this Court's Rule 10 than would an "opinion" of the Alaska Attorney General or, for that matter, the State's briefing in this case. Even the dissenting judge below (72 F.3d at 704-08 (Pet. App. 14-24)) ignored the Alaska court's *Totemoff* decision, although the State had brought the decision to the Ninth Circuit's attention in support of its petition for rehearing. *See* App. at 6a, *infra*.

1. As shown in the Statement (pp. 10-11, *supra*), Alaska has been subject to a dual system of fish and wildlife management since July 1, 1990: one established by the Secretary to govern subsistence hunting and fishing on the public lands; the other established by the State to govern all hunting and fishing on non-public lands, as well as non-subsistence hunting and fishing on public lands (to the extent not pre-empted by federal law). As the *Totemoff* case graphically illustrates, Alaskan subsistence users are already subject to one or both of two distinct management regimes, depending on whether

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[17] The procedural history of the *Totemoff* litigation is set forth in the Appendix, pp. 1a-7a, *infra*.

their hunting and fishing activities take place on or off the public lands (or on both public and non-public lands). If the State's prediction of "jurisdictional chaos" (Pet. 22) resulting from the judgment below had any merit, such chaos would already exist – and there would be nothing that this Court could do about it. Not only has the State abandoned any challenge to the Secretary's authority to implement a federal subsistence program for the public lands (*see* p. 13, *supra*), such a bifurcated management scheme is expressly required by Title VIII, and results altogether from the State's inability or unwillingness to comply with the conditions imposed by Congress. *See* pp. 6-8, *supra*. All that is involved in this case is the proper identification of "public lands" as defined in ANILCA. Regardless of the outcome here, some two-thirds of Alaska will continue to be regulated by the federal subsistence-management program. Whatever "chaos" (or lack of it) such a system produces will continue.

The State, in all events, has greatly exaggerated the consequences of dual management.[18] For more than five

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[18] Typical of the State's penchant for overstatement is its reliance on the Prince William Sound herring sac roe fishery as an example of the impossible situation created by the court below. Pet. 12. This fishery takes place exclusively in the marine waters of the territorial sea, not in inland rivers and streams (to which these fish do not migrate). Nothing in the Ninth Circuit's holding respecting federal reserved waters will have any effect of any kind on the State's management of this fishery.

Similarly beside the point is the State's emphasis (Pet. 13) on the claim of private respondents and others that the Secretary has the authority and obligation to regulate the uses of migratory species off the public lands in order to assure the priority for subsistence uses of those species when they move

years subsistence users of highly migratory species such as moose and caribou, and the animals themselves (which move on and off the public lands at will), have been subject to the dual federal/state management regime. *See also* Pet. 11 n.4 (describing different federal and state regulations governing subsistence hunting from boats). This has not resulted in chaos. Moreover, the Alaska Supreme Court (and to a lesser extent the State, *see* Pet. 20-21 & note 8) asserts that a "substantial" portion of the State's navigable waters are already properly regulated by the federal program, and that "some subsistence fishing takes place in non-navigable waters which are 'public lands.' " *Totemoff*, 905 P.2d at 968 & n.7 (Pet. App. 53). Although there certainly have been a few "conflicts" over the years, there is no evidence that either the people or the fish and wildlife of Alaska have been harmed. Again, however, to the extent this situation is deemed undesirable from the standpoint of good public policy, the State holds the key to the solution: comply with the conditions prescribed by § 805(d) of ANILCA, 16 U.S.C. § 3115(d). If that solution is not desirable, the State should be petitioning Congress, not this Court.

2. The State also errs in its persistent attempts to portray the Alaska court's *Totemoff* decision as *compelling* the State to defy the Ninth Circuit's judgment. The Alaska court did no such thing. *Totemoff* was a criminal case involving a subsistence hunter who was charged under state law with using a spotlight to aid in the

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on to the public lands. This claim has not yet been decided, but it has nothing to do with the scope of "public lands."

shooting of a deer on a federal island in Prince William Sound from a boat situated in marine waters. *Totemoff*, 905 P.2d at 957 (Pet. App. 25). The principal issue was whether the State's criminal jurisdiction was pre-empted by ANILCA or implementing federal regulations. The Alaska Supreme Court held that ANILCA did not pre-empt the field of subsistence regulation on public lands, and that in that case there was no actual conflict between state regulation and any provision of ANILCA or a federal regulation. *Id.* at 958-61 (Pet. App. 26-36).[19] These holdings were dispositive of the issue of state jurisdiction. Nonetheless, the court proceeded, on the *arguendo* assumption that these holdings were unsound, to pursue the theory that the State would still have jurisdiction "if ANILCA does not apply to the navigable waters from which Totemoff shined his spotlight at the deer." *Id.* at 961 (Pet. App. 36). But as previously noted, the "navigable waters" in question were part of the territorial sea and the Ninth Circuit below had already foreclosed the possibility that the marginal sea would be subject to the federal subsistence program by rejecting the district court's holding that the navigational servitude constituted "public lands." Rather than simply note that fact, or even express its independent agreement with the Ninth Circuit on the point, the Alaska court reached out to argue that the federal court erred in concluding that

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[19] The *Totemoff* court's construction of the pre-emptive scope of Title VIII of ANILCA *would* appear to conflict with prior decisions of the Ninth Circuit. *See United States v. Alexander*, 938 F.2d 942 (9th Cir. 1991); *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 313 n.1 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989). But that issue is not in any way involved in this case.

federally reserved waters are included within ANILCA's definition of "public lands." *Id.* at 962-68 (Pet. App. 36-53). The court did this without the benefit of adversarial briefing, despite the State's stipulation to be bound by the outcome in federal court, and even though the reserved-waters issue had no bearing on the case at hand. *See* App. at 2a-7a, *infra*. This is the purest form of *obiter dictum*, engaged in for no apparent purpose other than to manipulate this Court's certiorari jurisdiction. The Court should decline the gambit.

In any event, there is nothing in the *Totemoff* case that requires the State to do anything. The State is a party to the instant case, and it is bound by the decision below. That judgment directs the Secretary to identify federally reserved inland waters and to extend ANILCA's protection to subsistence fishing by rural Alaska residents on those waters. "Jurisdictional chaos" most certainly will not ensue. Alaska will continue to regulate sport and commercial fisheries in those (and all other) waters in the State; only to the extent that those non-subsistence fisheries deprive rural subsistence users of their customary and traditional fishing opportunities on the public lands will State regulation be subject to pre-emption – as it already is with respect to the majority of subsistence hunting and some subsistence fishing.[20]

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[20] The Alaska Supreme Court has acknowledged that any federal regulations that actually conflict with State regulations will pre-empt the State regulations. *Totemoff*, 905 P.2d at 960-61 (Pet. App. 32-36)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

CHRONOLOGY OF THE ALASKA SUPREME COURT'S DISPOSITION IN *TOTEMOFF v. STATE*

23 December 1993, *Totemoff v. State*, No. A-4276, 866 P.2d 125 (Alaska App.). The Alaska Court of Appeals, while upholding the trial court's finding of fact that Totemoff's alleged game violations (spotlighting deer) occurred on federal public lands (*id.* at 126 n.3), also upheld his conviction on the ground that the State's concurrent jurisdiction over federal lands was not generally pre-empted by ANILCA, and that there was no actual conflict between the applicable State and federal regulations. (Totemoff was charged with taking deer on Naked Island (federally owned) in Prince William Sound with the aid of a spotlight from a boat in the territorial sea.) The Court of Appeals did not address any *Katie John/ Alaska v. Babbitt* issue, and indeed did not even mention those pending federal cases, inasmuch as the State's Brief of Appellees (2 Feb. 1993), at 12 n.9, had urged the court to abstain from deciding any of those issues in deference to their ongoing adjudication in the federal-court cases in which the State was a party, one of which (*Alaska v. Babbitt*) it had initiated.

11 February 1994. Totemoff filed his Petition for Hearing, No. S-6151, asking the Alaska Supreme Court to review the *Totemoff* decision of the court of appeals. The petition raised no *Katie John* issue, and alluded to none, in view of the fact that both lower courts had found as fact that the offense alleged by the State occurred on federal land. The State's Response and Opposition to Petition for Hearing (3 March 1994) likewise made no mention of any *Katie John* issue.

30 March 1994. Chief Federal District Judge Holland filed his decision in the consolidated cases of *Katie John v. United States* (1990) and *Alaska v. Babbitt* (1992) on the issues of "who" should be affording the ANILCA subsistence priority on federal lands and waters (the federal government or the State) and "where" (on any or all navigable waters) beyond federal fast-lands that priority extended. Judge Holland held that the federal government had properly assumed subsistence-management authority over the public lands in 1990, and that the priority extends to all navigable waters in Alaska by reason of the navigational servitude of the United States.

18 April 1994, *Totemoff v. State,* No. S-6151. The Alaska Supreme Court entered an order granting the *Totemoff* petition for review and specifying three issues to be addressed by the parties:

> A. Whether the prosecution is "subject to a defense that spotlighting is a 'customary and traditional' method of taking game which is protected under ANILCA?"
>
> B. "If the answer to the above question is in the affirmative, is there a sufficient non-federal nexus in this case to sustain the conviction solely under Alaska law?"
>
> C. "With respect to question B above, is the State precluded by the [*Katie John*] decision from contending that tidelands or lands under navigable water within the three-mile limit are not subject to ANILCA?"

Although the latter two questions related to *Katie John,* they were to be answered *only* if the first question (whether ANILCA protects customary and traditional

methods of taking wildlife) was answered in the affirmative. No issue was raised by either the Court or the parties pertaining to federally reserved waters.

17 May 1994, *Katie John & Alaska v. Babbitt.* The Ninth Circuit granted the petitions of the State and the federal government for leave to take an interlocutory appeal from Judge Holland's *Katie John* decision.

28 June 1994, *Totemoff v. State,* No. S-6151. Counsel for the State and Totemoff filed with the Alaska Supreme Court a "Stipulated Request for Stay" asking the court to stay further proceedings in *Totemoff* until the Ninth Circuit had decided the State's appeal in *Katie John* and until any ensuing petitions for review by this Court had been resolved. In addition to noting the status of the *Katie John* appeal, the State and Totemoff stated: "Despite the fact that *John* may not reach final resolution in federal court until sometime in 1995 and possibly later, both parties stipulate and agree that this Court should stay this proceeding until these critical issues are finally resolved in federal court."

5 July 1994, *Totemoff v. State,* No. S-6151. The Alaska Supreme Court entered an order granting the parties' request to stay all proceedings in *Totemoff* "pending a decision by the federal court." The court directed the parties "to advise the clerk as soon as a decision is made by the federal court."

8 February 1995. The Ninth Circuit heard oral argument on the remaining ("where") issues in *Katie John* and *Alaska v. Babbitt* (i.e., whether ANILCA's subsistence priority applies to navigable waters by virtue of either the navigational servitude or federal reserved water rights).

17 February 1995, *Totemoff v. State,* No. S-6151. Although no party had asked it to do anything, the Alaska Supreme Court *sua sponte* issued an order vacating the 5 July 1994 stay and directing that briefing proceed forthwith on an expedited basis. Totemoff filed his brief on 31 March, and the State filed its brief on 20 April. Neither brief contained any argument on the issue of whether federal reserved water rights constitute "public lands" under ANILCA. The only mention of the issue was in the State's Brief of Respondent, at 23 n.10, where the State pointed out that the reserved-water-rights doctrine can have no application to the ocean.

20 April 1995, *Katie John v. United States & Alaska v. Babbitt,* 54 F.3d 549 (9th Cir.) (9th Cir. Nos. 94-35480 & -35481). The Ninth Circuit decided the remaining *Katie John* issues, holding that the navigational servitude does not make all of Alaska's navigable waters federal public lands to which ANILCA's priority for subsistence fishing therefore applies, but that federally reserved waters appurtenant to congressional and executive reservations of the public domain in Alaska do constitute such "public lands," that is, "lands, waters and interests therein the title to which is in the United States." That same day the State filed a copy of the Ninth Circuit's decision with the Alaska Supreme Court, along with a letter asserting that the Ninth Circuit's rejection of the navigational servitude as a basis for ANILCA jurisdiction disposed of any possibility that Totemoff's boat was on public lands, since federal reserved water rights apply only to inland waters. (Totemoff then moved to strike the cover letter because it contained argument.)

24 May 1995, *Totemoff v. State,* No. S-6151. The Alaska Supreme Court entered an order striking the State's cover letter, but allowing the State to file "a short supplemental brief" concerning the Ninth Circuit's decision within three days, and allowing Totemoff to file a short response within five days thereafter. The State seized the opportunity to file a 15-page brief in 26 May contending that the Ninth Circuit's decision was wrong about the nature and scope of federally reserved waters in relation to ANILCA's definition of public lands. In his responsive brief filed on 31 May, defendant Totemoff (whom the two lower courts had found to have committed the offense charged by the State on federal fast-lands) argued that the court had no business reviewing the Ninth Circuit's decision, which did not affect him either way and to which the State had voluntarily bound itself (and in any event was bound by the common law of collateral estoppel); he also argued that the court should not reach out to decide the issue in the absence of the federal government being a party to the case. Totemoff made no effort to brief the correctness of the Ninth Circuit's decision which he deemed immaterial to his case.

8 June 1995. Although no one had asked for an expedited hearing, much less accelerated briefing (Totemoff had received no jail time), the Alaska Supreme Court scheduled and heard oral argument shortly after the last supplemental brief was filed.

7 August 1995, *Totemoff v. State,* No. S-6151, Slip Opinion No. 4236 (Alaska). Within an unprecedented

sixty days of oral argument,[1] the Alaska Supreme Court filed its "opinion," reaching out and (unnecessarily) deciding that the Ninth Circuit had committed error with respect to a number of federal questions related to federally reserved waters that had not been subjected to adversarial briefing and argument in the *Totemoff* case – and that were not even presented by the controversy at hand. The court first held that ANILCA did not pre-empt State criminal jurisdiction in the context at bar, in part because it did not protect hunting methods. Slip op. at 3-12. Although that holding was dispositive, the court then proceeded at length to argue that the Ninth Circuit was wrong in its reserved-waters ruling. Slip op. at 12-31.

8 August 1995, *Katie John v. United States & Alaska v. Babbitt*, 9th Cir. Nos. 94-35480 & -35481. The Ninth Circuit panel entered an order denying the State's petition for rehearing and rejecting its suggestion for rehearing *en banc*. Pet. App. 55. (On this same day, the State filed with the Ninth Circuit a copy of the Alaska Supreme Court's *Totemoff* opinion as supplemental authority in support of the petition for rehearing.)

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[1] The Alaska Attorney General publicly speculated that the Court was trying to lend the State a hand in its federal *Katie John* litigation:

> My suspicion is that the court wanted to get the opinion out as quickly as possible so the (federal appeals court) would have a chance to see it before it ruled on the reconsideration issue. Unfortunately, we didn't beat the clock.

Anchorage Daily News, p. A-1, 9 August 1995.

10 August 1995, *Katie John v. United States & Alaska v. Babbitt*, 9th Cir. Nos. 94-35480 & -35481. The Ninth Circuit entered an order withholding issuance of its mandate.

19 August 1995. Full jurisdiction over the *Totemoff* case returned to the State trial court pursuant to ALASKA RULE OF APPELLATE PROCEDURE 507.

30 August 1995, *Katie John v. United States & Alaska v. Babbitt*, 9th Cir. Nos. 94-35480 & -35481. The Ninth Circuit entered an order requesting the parties to submit supplemental five-page letter briefs addressing the "public lands" analysis in the Alaska Supreme Court's *Totemoff* opinion of 7 August.

20 October 1995, *Totemoff v. State*, No. S-6151, Corrected Slip Opinion No. 4276, 905 P.2d 954 (Alaska) (Pet. App. 25). Although jurisdiction over the case had long since returned to the trial court, the Alaska Supreme Court *sua sponte* entered an order withdrawing its 7 August opinion and replacing it with a "corrected" opinion. The order explained that "the corrections are found in the last full paragraph on page 18 and in the first full paragraph on page 26." Page 8a, *infra*. (These paragraphs, as they appeared in the original 7 August opinion are set forth at pp. 8a-9a, *infra*. *Compare with* Pet. App. 41 & 49 (905 P.2d at 963 & 967).)[2]

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[2] According to defendant Totemoff's petition for rehearing, filed with the Alaska Supreme Court on 30 October 1995, the "corrected" opinion was the product of the court (even though it no longer had jurisdiction of the case) having obtained, *ex parte* from counsel for the State, copies of the letter briefs the federal-court parties had filed with the Ninth Circuit.

ORDER FILED 20 OCTOBER 1995 IN *TOTEMOFF v. STATE* (ALASKA SUPREME COURT NO. S-6151)

Before: Compton, Chief Justice, Rabinowitz, Matthews, Moore, and Eastaugh, Justices.

IT IS ORDERED, SUA SPONTE:

1. Opinion No. 4236 issued in this case on August 7, 1995, is WITHDRAWN.

2. Corrected Opinion No. 4276 is issued today in its place. The corrections are found in the last full paragraph on page 18 and in the first full paragraph on page 26.

Entered by direction of the court at Anchorage, Alaska on October 20, 1995.

CLERK OF THE
SUPREME COURT

/s/ Jan Hansen
JAN HANSEN

EXCERPTS FROM PAGES 18 AND 26 OF SLIP OP. NO. 4236 FILED 7 AUGUST 1995 IN *TOTEMOFF v. STATE* (ALASKA SUPREME COURT NO. S-6151)

* * * *

For a number of reasons, we find that neither the navigational servitude nor reserved water rights bring navigable waters within ANILCA's definition of "public lands," and that the federal government has no authority

to regulate hunting and fishing in Alaska's navigable waters. [Slip op. at 18.]

* * * *

Fifth, the navigational servitude is derived from the Commerce Clause, *see Cherokee Nation*, 480 U.S. at 704, and the power to reserve water rights comes from the Commerce and Property Clauses. *Cappaert*, 426 U.S. at 138. Neither of these clauses gives Congress the authority to regulate subsistence hunting and fishing on state land or water. *Cf. United States v. Lopez*, 115 S. Ct. 1624 (1995) (Commerce Clause does not give Congress authority to ban possession of firearms in school zones). Thus, neither the navigational servitude power to regulate for navigation purposes nor the power to reserve water rights can grant the federal government jurisdiction to manage hunting and fishing in navigable waters. The two powers are over navigation and water, not fish and game. [Slip op. at 26.]